**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

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| **VICTORIA L. THOMAS** | ) | |
| Claimant | ) | |
| V. | ) | |
| | ) | Docket No. 1,050,591 |
| **PIT STOP LIQUOR** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **KANSAS WORKERS COMPENSATION FUND** | ) | |

# ORDER

Claimant requests review of the April 14, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

## APPEARANCES

Patrick C. Smith, of Pittsburg, Kansas, appeared for the claimant. Timothy Grillot, of Parsons, Kansas, appeared for respondent. William L. Phalen, of Pittsburg, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

## RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from August 18, 2010, with exhibits attached, the transcript of the deposition of Roland Sailsbury, taken February 7, 2011, with exhibits attached and the documents of record filed with the Division.

## ISSUES

The ALJ found claimant failed to establish her work-related accident causally contributed to her injury, medical condition or disability, and denied claimant's preliminary hearing requests.

Claimant appeals, arguing the ALJ erred in his decision because this is an old law case under which accidental injuries are compensable where the accident serves to aggravate or accelerate an existing disease or intensifies an affliction. The prevailing factor analysis is not relevant or appropriate for claimant's date of accident. Therefore, the ALJ's

Order should be reversed and claimant awarded medical treatment as recommended by Dr. Rhoades, the court-appointed medical examiner.

Respondent was uninsured at the time of the accident, therefore, the Workers Compensation Fund (Fund) was impleaded.

The Fund argues the ALJ's Order should be affirmed. The Fund contends claimant failed to request additional time to present evidence and, therefore, the only evidence is the report of Dr. Rhoades, which clearly indicates claimant's left shoulder condition is not work-related.

The issue on appeal is whether claimant sustained injury arising out of and in the course of her employment and whether that injury causally contributed to her medical condition.

## FINDINGS OF FACT

Claimant worked for respondent, Pit Stop Liquor, for 9 to 10 years. Her job duties were to put away cases of beer and liquor, stock shelves, operate the drive-up window, run the cash register and clean and sweep. She worked six days a week. Claimant testified her duties required more pulling down than lifting overhead, which she would do maybe 20 times a day or shift with weekends being the busiest at 50 to 60 times.

Claimant, who is right hand dominant, first started having noticeable pain in her right shoulder in 2007. She met with Jimmy Buller, D.O., on September 21, 2007, for her regular 90 day visit in relation to her diabetes and discussed her right shoulder pain, which also went into her neck, into those conversations. She did not notice any pain in her left shoulder. Claimant described her right shoulder pain as knives jabbing in the shoulder, in the joint and in the muscle. She also had numbness from her right shoulder down into her right arm and hand. Dr. Buller's notes indicate claimant complained of numbness in both arms.

On February 7, 2008, claimant reported to Dr. Buller that her severe right shoulder pain was attributed to her work with respondent. This pain became constant a year later. The office notes also indicate numbness in the left shoulder and down the arm. Again, there was no indication of pain in the left shoulder.

Claimant testified respondent was aware she was hurting as she talked with the owner about it. Claimant testified she was close with the owner and there was not much that was not known about each other. She felt there was more than an employee relationship between herself and the owner. Claimant indicated that when she had pain she would notify respondent. Claimant testified respondent let her go to medical supply and get a shoulder brace when she complained of pain in her right shoulder. Claimant wore the shoulder brace while she was at work and respondent had someone come in and help with the heavy lifting.

Claimant's last day of work was February 17, 2010. In April 2010, claimant was referred to Kevin M. Mosier, M.D., and had x-rays of her shoulder. An MRI was recommended before proceeding with treatment. Claimant was given a sling and continued with a series of cortisone injections that started with Dr. Buller. The injections provided temporary relief. The effect of the last injection lasted less than 24 hours. Claimant testified that after she stopped working she would only wear the shoulder brace when in severe pain, at the instruction of Dr. Mosier, to avoid developing a frozen shoulder.

Claimant admits to suffering a neck injury from a motorcycle accident in 2006. She testified she does not recall her back or shoulder hurting from the motorcycle accident, but admitted it was possible she had pain in those areas because everything was ongoing and did not become severe for quite a while.

Roland Sailsbury, owner of Pit Stop Liquor, has been in business for 11 years as of December 2010. Mr. Sailsbury testified claimant worked for him doing clerical work, waiting on customers, stocking shelves and answering the phones. She would also sell beer on a regular basis. His store would average selling 50 to 60 30-packs of beer and 40 to 50 12-packs of beer per week. He testified the shelves are 60 inches tall. Claimant would be required to lift the packs of beer, the same as the other employees. He testified 40 percent of his business is from the drive-up window where the employees lift the beer up to the window. The other 60 percent involves walk-in business where the customers pick up their own beer.

Mr. Sailsbury testified claimant complained of pain every day, but did not identify the cause of the pain. He indicated claimant told him she was injured doing maintenance work while working for KP&L years before. He testified she told him she injured her shoulder ramming rods to clean some kind of boiler. He does not remember when she started wearing the shoulder brace on her right shoulder. He testified claimant never reported getting hurt during her employment with him. According to Mr. Sailsbury, when claimant had her brace on she lifted with her left shoulder. Mr. Sailsbury testified he first learned of claimant alleging she had a work injury in May 2010, when he received notice through the court that she was claiming workers compensation.

Mr. Sailsbury indicated he authorized claimant to obtain treatment with Dr. Mosier. He originally thought he had workers compensation insurance, but found out when claimant filed her claim that it had not been renewed after 2004. He has since purchased a policy, with his financial ability to pay being dependent on how large the claim ends up being.

Claimant's employment was terminated on February 17, 2010, after she became angry upon finding out Katrina Fausset was Mr. Sailsbury's girlfriend. Ms. Fausset testified that on February 17, 2010, she was at the store visiting and claimant asked if she was Mr. Sailsbury's girlfriend. When she said yes, claimant flew off a stool she was sitting on, grabbed the stool with both hands and tossed it, hitting some bottles. Claimant also threw the business phone 8 or 9 feet with her right hand and her personal phone with her left hand. She was not wearing her shoulder brace at this time. Ms. Fausset testified she saw claimant

wearing the shoulder brace probably two or three days, but not on this day. There was no discussion as to the reason claimant wore the brace other than she had shoulder pain. Claimant hasn't worked since February 2010. She had surgery on her right shoulder with Kevin Mosier, M.D., on April 28, 2011.

Claimant filed an Application for Preliminary Hearing on September 18, 2014, requesting authorized treatment for her left shoulder, along with payment for medications for her right shoulder and right shoulder pain management. A preliminary hearing was scheduled and held on December 11, 2014, but no record was taken. Prior to the hearing, and at the request of the parties, the ALJ ordered an independent medical examination (IME) with the first available physician at Dickson Diveley Clinic, which was Charles E. Rhoades, M.D.

When claimant met with Dr. Rhoades for the IME on January 21, 2015, her chief complaint was left shoulder pain. Claimant advised Dr. Rhoades that when she was being evaluated by Chris Fevurly, M.D., for case closure and a maximum medical improvement (MMI) determination for her right shoulder, she felt and heard a pop in her left shoulder while flexing during range of motion testing. Claimant admitted to left shoulder pain for many years, but reported this examination incident increased her pain, which has persisted ever since. Dr. Rhoades was tasked with determining the cause of claimant's left shoulder problems and whether she needed further medical treatment for the left shoulder.

Dr. Rhoades diagnosed claimant with chronic left shoulder impingement syndrome with rotator cuff tendinitis. Dr. Rhoades recommended physical therapy for range of motion and strengthening, scapular stabilizing exercises and a subacromial cortisone injection in conjunction with physical therapy. Should pain persist despite physical therapy, an MRI was recommended to evaluate the rotator cuff pathology. Should conservative treatment fail and the MRI demonstrate an operative lesion, left shoulder arthroscopy with rotator cuff repair and acromioplasty may become necessary.

Dr. Rhoades provided the following causation opinion:

> The prevailing factor for her left shoulder pain is not her work injury or the examination by Dr. Chris Fevurly, performed on July 29, 2014. The history of 10 years of working in the liquor store, lifting and moving product, and helping customers, is a contributing factor to shoulder tendon wear, but not the prevailing factor for her pain.
>
> It is my opinion to a reasonable degree of medical certainty, that the patient's complaints and diagnosis are not related to her work or the examination by Dr. Chris Fevurly. I believe her age and long history of diabetes is the prevailing cause of her current diagnosis and the need for treatment.[1]

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[1] Rhoades IME Report at 3.

## PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-501(a) states:

> (a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

Claimant requests medical treatment for her left shoulder, which she claims stems from the original work duties performed for respondent through February, 2010. Claimant's medical records indicate numbness in her left arm, but contain no mention of left shoulder pain. Claimant also contends she suffered an onset of pain while being examined by Dr. Fevurly when MMI was being determined on her right shoulder.

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[2] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[5]

An injury shall not be deemed to have been directly caused by the employment where the injury results from normal activities of day-to-day living.[6]

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.[7]

Claimant was referred to Dr. Rhodes for an IME by the ALJ on January 21, 2015. Claimant was diagnosed with left shoulder impingement syndrome with rotator cuff tendinitis. Dr. Rhodes noted claimant's 10 year history of working in the store with lifting and moving products. He identified this as a contributing factor to shoulder tendon wear, but not for claimant's pain. Nor does he connect the impingement syndrome and rotator cuff tendinitis diagnoses to claimant's prior job with respondent. He stated "to a reasonable degree of medical certainty, that the patient's complaints and diagnosis are not related to her work or the examination by Dr. Chris Fevurly. I believe her age and long history of diabetes is the prevailing cause of her current diagnosis and the need for treatment."[8]

This accident occurred before the major modifications to the Kansas Workers Compensation Act (Act) occurred in May 2011. Prior to the implementation of those modifications the Act was liberally applied to accidents which aggravated or accelerated preexisting conditions. Additionally, every natural consequence of a primary injury which flows from that injury was compensable if it was a direct and natural result of the primary injury. While Dr. Rhodes finds the job duties performed by claimant with respondent could contribute to shoulder tendon wear, he does not identify those job duties as contributing to claimant's diagnosed conditions. Instead, he finds no relationship between claimant's complaints and diagnosis and the job with respondent or the examination by Dr. Fevurly.

This Board Member finds claimant has failed to prove her current need for medical treatment is associated with her job with respondent or with the examination by Dr. Fevurly. The opinion provided by Dr. Rhodes is specific, although a bit ambiguous, on those points. Perhaps the doctor could more clearly explain his opinion if his deposition were to be taken.

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[5] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[6] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 2, 147 P. 3d 1091, *rev. denied* 281 Kan. 1378 (2006).

[7] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[8] Rhoades IME Report at 3.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

## CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has failed to prove her work with respondent causally contributed to her injury, medical condition, disability or current need for medical treatment.

## DECISION

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated April 14, 2015, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of July, 2015.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge

[9] K.S.A. 2013 Supp. 44-534a.